Title:
United States Supreme Court may make it easier to invalid patents.

Subtitle:
The Court will consider the possible end of the “clear and convincing” standard of review for all patent invalidity defense in *Microsoft v. i4i*.

Text:
It will be easier to attack the validity of some patents if Microsoft prevails in a case that the Supreme Court has now accepted for consideration. Since its inception in 1982, the Federal Circuit Court of Appeals has required that a patent could be declared invalid only if the proof of invalidity was *clear and convincing*, even in cases where the invalidating prior art was not reviewed by the U.S. Patent and Trademark Office (PTO). In *Microsoft v. i4i*, Microsoft, facing a substantial damage award won by i4i, argued that the Federal Circuit erred in affirming the judgment from the district court for the Eastern District of Texas and not allowing the lower preponderance of the evidence standard for prior art not previously reviewed by the PTO.

While Microsoft could have raised several grounds on appeal, the single question presented in the petition for writ of *Certiorari*, granted November 29, is "whether the [Federal Circuit] erred in holding that Microsoft’s invalidity defense must be proved by *clear and convincing evidence*?" The thrust of Microsoft’s argument is directed at limiting the requirement for the *clear and convincing standard* of proof to those cases presenting questions of patentability based on “prior art” that was not previously presented in the patent office.

The case will feature high profile Supreme Court lawyers Seth Waxman, for i4i, and Theodore Olsen, for Microsoft. Given the importance of the case, many amicus briefs are expected. Already eleven amicus briefs supported the grant of certiorari. It will likely be several months before the case is fully briefed and ready for argument.

If Microsoft prevails, those challenging patent validity where the prior art was not previously before the PTO will be subject to the same proof standard required in most civil cases, namely the standard based on a *preponderance of the evidence*. Thus if a judge or jury finds that more probably than not a patent is invalid, this will suffice to invalidate the patent. Under that standard, more and more patents are likely to be found invalid.

The case of *Microsoft v. i4i* will be taken up by the Supreme Court, and a decision is expected, in 2011. Stay tuned…